

exceeded two hundred and thirty-eight thousand dollars (\$238,000). Alex Ryan Cauley, through his attorney, brought this action alleging entitlement to ongoing compensation until he reached the age of 23, as he was a full-time student. The ALJ determined that K.S.A. 44-510b(a) and 44-510b(h) required a termination of the benefits after the minor child reached the age of 18, when the maximum benefit amount had been reached or exceeded. K.S.A. 1987 Supp. 44-510b(h) states:

Notwithstanding any other provision in this section to the contrary, the maximum amount of compensation benefits payable under this section to any and all dependents by the employer shall not exceed a total amount of \$200,000 and when such total amount has been paid the liability of the employer for any further compensation under this section to dependents, other than minor children of the employee, shall cease except that the payment of compensation under this section to any minor child of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated under this subsection and shall not be subject to termination under this subsection until such child becomes 18 years of age.

The ALJ in his March 13, 2006 Award stated that the plain statutory construction of K.S.A. 44-510b(h) "can lead to the only conclusion that it was the legislature's intent that after the statutory maximum benefits had been paid, further liability to a decedent's child ends on that child's eighteenth birthday."¹ The matter was appealed to the Board, which affirmed the termination of benefits in its Order of June 13, 2006. This decision by the Board was not appealed.

This issue had earlier been decided in *Dawson*.² In *Dawson*, the Board, in denying the decedent's child added benefits, held:

This statute is clear and unambiguous in stating that death benefits terminate when a surviving minor child becomes 18 years of age "notwithstanding any other provision in this section to the contrary." The decedent's surviving spouse and son argue that children are entitled to receive death benefits until they reach the age of 23, if enrolled in an accredited institution of higher education or disabled, citing K.S.A. 1983 Supp. 44-510b(a)(3).

Dawson is additionally significant in that the attorney for respondent in *Dawson* is the same attorney who now represents Alex Ryan Cauley in this matter.

¹ ALJ Award of March 13, 2006.

² *Dawson v. Dawco Manufacturing Company, Inc.*, No. 101,065, 2003 WL 21962917 (Kan. WCAB July 31, 2003).

The attorney for Alex Ryan Cauley has now requested attorney fees pursuant to K.S.A. 44-536. The ALJ, in denying attorney fees, found “[c]laimant’s counsel was aware of this finding by the Workers Compensation Board as he was Respondent’s counsel. The Claimant’s request for attorney’s fees is denied.”

In determining whether an award of attorney fees is proper, the Board must first determine which version of K.S.A. 44-536 is applicable. The version of K.S.A. 44-536 in effect on February 5, 1988, the date of Joe Allyn Cauley’s death, states in part:

(g) In the event any attorney renders services to an employee or the employee’s dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for vocational rehabilitation, a hearing for additional medical benefits, or otherwise, such attorney **shall** be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim If such services involve no additional award of compensation, the director shall fix the proper amount of such attorney’s fees in accordance with this subsection and such fees shall be paid by the employer.³ (Emphasis added.)

The version of K.S.A. 44-536 in effect on November 8, 2005, when Alex Ryan Cauley entered into the attorney-client contract in this matter, has the following modified language:

If the services rendered herein result in a denial of additional compensation, the director **may** authorize a fee to be paid by the respondent.⁴ (Emphasis added.)

Understandably, the attorney for Alex Ryan Cauley argues the 1988 [sic]⁵ version controls and the award of attorney fees is mandatory. Respondent argues for the 2005 version, contending the award of attorney fees is up to the discretion of the Director. The ALJ, in denying attorney fees in this matter, apparently applied the more recent version. The Board affirms that determination. The Kansas Court of Appeals in *May*⁶ held that the date of contract controls the version of K.S.A. 44-536 applicable to a contract between a

³ K.S.A. 1987 Supp. 44-536(g).

⁴ K.S.A. 44-536.

⁵ The attorney for Alex Cauley argues that it is the 1988 version that controls in this case. However, it is actually the 1987 version that may be appropriate for the accident which occurred on February 5, 1988.

⁶ *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

client and the attorney.⁷ The Board, however, disagrees with the ALJ's denial of a fee in toto. Post-award attorney fees serve a significant purpose in workers compensation litigation.

While this provision is certainly a bitter pill for an employer or his insurer to swallow, it is necessary to assure continued representation of claimant after an award. An additional benefit accrues to all concerned from this added incentive on the part of respondent to resolve post-award disputes without protracted litigation.⁸

The Board finds that an award of attorney fees in this matter is appropriate.

However, the amount of attorney fees is in dispute, with respondent arguing the total of fees claimed is excessive. The attorney for Alex Cauley filed a Billing Memorandum with the Division alleging time expended of 52.40 hours, including time spent by partners in the firm, associates and law clerks. Many of the entries involved a review of documents, receipt and analysis of Traveler's payments⁹ and substantial research of the issues in question. As noted by the ALJ, this attorney previously litigated this very issue in *Dawson*. It is difficult to imagine so much research on this same issue, especially considering the fact that no appeal was taken from the Board's denial of benefits. Had the attorney appealed this matter in order to perhaps get the Board's earlier decision in *Dawson* reversed, the added research could, perhaps, be justified. But no such appeal was filed. The likelihood in convincing the Board to reverse its earlier position was slim. This fact could not have been lost on the attorney for Alex Cauley, considering his knowledge of the law on this issue. The Board finds the request for attorney fees, while proper, must involve a significant reduction in the amount requested. The Board finds an award of \$2,000.00 is appropriate in this matter.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated September 8, 2006, should be, and is hereby, modified to award attorney fees in the amount of \$2,000.

IT IS SO ORDERED.

⁷ *Id.* at 68.

⁸ Timothy J. Short, *Attorney Fees for Representing a Claimant After Final Award*, Journal of the Kansas Trial Lawyers Association, Vol. XIII, No. 2, p. 13 (1989).

⁹ This confounds the Board, since the insurance company of record in this matter is Aetna Casualty and Surety Company.

Dated this ____ day of January, 2007.

BOARD MEMBER

BOARD MEMBER

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c: Terry J. Torline, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent and its Insurance Carrier
Kendall R. Cunningham, Attorney for the Fund
John D. Clark, Administrative Law Judge